Supreme Court, U.S.
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No. 91-1704

In The

Supreme Court of the United States

October Term, 1991

OVERSEAS MOTORS, INC.,

Petitioner,

v.

MIROLJUB MITKOVSKI and
NATIONAL LABOR RELATIONS BOARD,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT MIROLJUB MITKOVSKI'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision when it determined that an employer that had discharged an employee in violation of the National Labor Relations Act did not meet its burden of demonstrating that the former employee had intentionally concealed income he received during the backpay period.

STATEMENT OF THE CASE

Petitioner's statement of the case is slanted. This Court should rely on the Sixth Circuit's statement of facts. (A 2-6)[1] It has the virtue of neutrality.

Petitioner is also selective. Petitioner fails to mention certain pieces of "this voluminous litigation[.]" (A 2) Petitioner reinstated Mitkovski in July 1984 only after the Sixth Circuit had issued an order to show cause why it should not be held in contempt. (A 111-112) Petitioner also fails to mention that in December 1988 it filed a complaint for injunctive relief in the United States District Court for the Eastern District of Michigan seeking a stay of all proceedings before the National Labor Relations Board ("Board") and an order determining that it was not obligated to Mitkovski for backpay. (Civil Action No. 88-75112) The district court granted the Board's motion to dismiss for lack of subject matter jurisdiction. (A 28) Petitioner's contempt and its frivolous lawsuit should provide this Court with a clue as to its motivation in filing this petition.

Petitioner also mischaracterizes the Board decision that the Sixth Circuit reversed. The Board majority (the decision was two/one) was not deciding this case based on its precedent. Nor was it establishing new precedent. Rather, the Board began and ended its analysis by stating that it was attempting to interpret the Sixth Circuit's remand:

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[1] The appendix is abbreviated "A" followed by the page number(s). Petitioner's brief is abbreviated "B" followed by the page number(s).

> We start from the proposition that we are deciding this case within the scope of a limited remand from the court of appeals and the findings and conclusions of the court must be treated as the law of the case.
>
> . . .
>
> In these circumstances, we are constrained by the court's remand to deny backpay in this case.

(A 16, 18, n. 13)

SUMMARY OF ARGUMENT

It is at best disingenuous and at worst dishonest for petitioner to claim that the Sixth Circuit took from the Board its authority to protect the integrity of its processes. The Sixth Circuit remanded this case to the Board with certain instructions. The Board attempted to follow them. The Sixth Circuit concluded that the Board majority had failed to do so.

ARGUMENT

THE COURT OF APPEALS DID NOT DEPART FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS SO AS TO CALL FOR THE EXERCISE OF THIS COURT'S POWER OF SUPERVISION WHEN IT DETERMINED THAT AN EMPLOYER THAT HAD DISCHARGED AN EMPLOYEE IN VIOLATION OF THE NATIONAL LABOR RELATIONS ACT HAD NOT MET ITS BURDEN OF DEMONSTRATING THAT THE FORMER EMPLOYEE HAD INTENTIONALLY CONCEALED INCOME HE RECEIVED DURING THE BACKPAY PERIOD.

This is a case in which the liability issues have been resolved. The remaining issue is remedial. After the Board ordered that Overseas pay Mitkovski the backpay

due him, the Sixth Circuit remanded to the Board with instructions based on its finding that the administrative law judge ("ALJ") had impermissibly restricted petitioner's cross examination of Mitkovski regarding his interim earnings. The ALJ then conducted two further hearings. The ALJ made findings of fact which are not in dispute. The ALJ concluded that petitioner had not met its burden of demonstrating that Mitkovski had intentionally concealed income he received during the backpay period. The Board, construing the Sixth Circuit's instructions differently than the ALJ, reversed. The Sixth Circuit found that the ALJ's analysis was correct.

Given the unexceptional nature of this decision, petitioner is forced to misconstrue it in constructing an argument why this case merits review. The premise on which petitioner's argument is based is:

> In this case, the Board determined that the appropriate remedy for Mr. Mitkovski's unlawful discharge included reinstatement without backpay – an option expressly provided for in § 10(c) – as well as a cease-and-desist order against the Company and a notice-posting requirement. *Overseas Motors, Inc.*, 260 NLRB 810, 815 (March 11, 1982). Accordingly, the Board declined to adopt the administrative law judge's recommendation that Mr. Mitkovski receive backpay.

(B 10)[2]

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[2] Petitioner appears to be arguing that the Board in its 1982 decision determined that the appropriate remedy was reinstatement without backpay. That decision is to the contrary – the Board adopted an ALJ decision which included a backpay remedy. (A 151-170)

Petitioner is trying to say that when the Board in 1989 interpreted the terms of the Sixth Circuit's remand as requiring that it not order backpay it was making a policy decision that backpay was not an appropriate remedy. In other words, petitioner's brief reads as if the Board had said: "Based on the facts as developed at the hearings subsequent to the remand, we decide pursuant to our broad discretion in fashioning appropriate remedial orders that the backpay remedy is not appropriate here." Petitioner's problem is that that was not what the Board said. It said it was attempting to interpret the Sixth Circuit remand.

In addition to basing its argument on a false premise, petitioner dresses it up by implying that the Sixth Circuit decision is inconsistent with established Board precedent (B 8) and with a ruling of this Court (B 12-14). Neither implication is warranted.

First, petitioner implies that the Board was claiming that its ruling was consistent with established Board precedent. (B 8) Petitioner relies on a footnote in the Board opinion stating that "to the extent there is evidence from which it can be inferred" that the claimant had received substantial sum of money and that money could not be attributed to any particular quarter, then it would be appropriate to deny all backpay. (A 18, n. 12) That is the very inference that the Sixth Circuit held that the Board had no business making. If one needs any further evidence that these cited Board cases do not support what the Board did in this case, one need only look to the Board's words in the first case cited by petitioner:

> It must be emphasized, however, that these cases would not license a judge – or the Board – to deny all backpay to a discriminatee simply because he lied about a particular matter or

> even was generally unworthy of belief. Such a reading of those cases would effectively negate the rule of *American Navigation,* and would not accord with rational standards of adjudication.

Ad Art Inc., 280 NLRB 985, 989 (1986).

Finally, petitioner argues that the Sixth Circuit decision is inconsistent with this Court's ruling in *Universal Camera Corp. v. NLRB,* 340 U.S. 474 (1951). It is not. The Sixth Circuit correctly cited *Universal Camera* for the propositions that: 1) an ALJ's decision is entitled to substantial weight and must be considered when evaluating an NLRB decision and order; and 2) evidence supporting an NLRB order can be treated as less substantial when an ALJ who has observed the witnesses has drawn conclusions different from the Board's. Petitioner incorrectly claims that the Sixth Circuit relied on *Universal Camera.* It relied on the Board having misconstrued its remand instructions.

CONCLUSION

This is a garden variety, fact specific case in which the Sixth Circuit determined that the National Labor Relations Board had failed to properly follow its remand instructions. There is no reason for this Court to grant this petition.

Respectfully submitted,

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